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Missouri Appellate Practice and Procedure in Civil Cases

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MISSOURI APPELLATE PRACTICE AND PROCEDURE IN CIVIL CASES

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Upon being told that he was suffering from hardening of the arteries, an inquisitive patient asked the doctor when the process had begun. The doctor replied that it had actually started on the day of the patient's birth.

So it is with any consideration of the subject of appellate practice and procedure. The case reviewed in the appellate court is necessarily the one tried to a final conclusion in the trial court. It is regarded in the appellate court upon the same theory as that adopted by the parties in the court below. The whole purpose of the appeal is to determine whether reversible error was committed at any stage of the trial below. Consequently any discussion of appellate practice and procedure cannot properly be limited to the period following the filing of the transcript in the appellate court, or even to the period following the giving of notice of appeal in the trial court, but instead must revert back to the very institution of the action when the first opportunity for error was presented.

PRESERVATION IN TRIAL COURT OF POINTS FOR REVIEW

It is thus to be seen that an appellate court, when exercising its appellate jurisdiction, is purely a court of review, which means that for it to be put in a position where it may determine whether error was committed by the lower court, the appellant, generally speaking, must not only have presented the matter of which he complains to the lower court for its decision, but he must also have preserved his objection to the adverse ruling in such a way as to entitle the appellate court to act upon it. Even in the class of cases which are said to be triable *de novo* on appeal, the appellate court acts none the less in the same limited capacity, and is precluded from considering any matter which should have been, but was not, made a ground of the motion for a new trial, where such a motion was required for preserving matters for appellate review.

But as in the case of most rules, this one likewise has its

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exceptions, which are to be found enumerated in MO. SUPREME COURT RULE 3.23, which was promulgated as supplemental to a number of code provisions including MO. REV. STAT. § 512.160(1) (1949). It will be observed that questions of jurisdiction over the subject matter and of the sufficiency of the pleadings to state a claim or defense can be raised in the appellate court without having been preserved in a motion for a new trial. This is but a transition from the old concept that such questions appeared on the face of the record proper, and were not matters of exception in connection with errors occurring at the trial. Lack of jurisdiction over the subject matter necessarily vitiates the entire proceeding; and the question of such lack of jurisdiction may consequently be taken advantage of at any time or stage of the proceedings, either in the trial or the appellate court. So also with the question of a petition which wholly and completely fails to state a cause of action or claim upon which relief can be granted, and which could therefore have invested the court with no jurisdiction to grant relief in the particular instance, although the court might have complete jurisdiction over the general class of cases to which the nonexistent case would nominally belong. Now to these two familiar exceptions has been added an important third—the question of the sufficiency of the evidence to support the judgment in cases tried upon facts without a jury as provided by MO. REV. STAT. § 510.310 (1949).

But apart from any requirement that allegations of error, in order to be preserved for appellate review, shall be set up as grounds of the motion for a new trial, it is also necessary that the party who charges error in connection with any particular action of the court shall, at the time the ruling or order of the court was sought, have made known to the court the action which he desired the court to take or his objection to the court's action and his grounds therefor.[1] There is the exception, however, that it is not necessary to state grounds for objections to instructions; and whenever error in instructions is claimed, a general statement in the motion for a new trial of any allegations of error based thereon is sufficient. However, as for matters other than instructions, a general statement in the motion for a new trial is only sufficient where definite objections or

1. MO. REV. STAT. § 510.210 (1949).

requests with specific statement of grounds were made at the appropriate occasion during trial.[2]

It is to be borne in mind that the practice of saving formal exceptions to adverse rulings of the court has been expressly abolished, and in its stead has been substituted the procedure referred to above. Accompanying all this has been the idea of compelling counsel to be definite and specific in the statement of their positions upon any given point so that the trial court may be apprised of the actual legal question involved and be afforded the opportunity to rule accordingly. If counsel himself desires a particular ruling by the court, he must definitely make known the action which he desires the court to take; and if the action of which he complains is one that has been sought by his adversary, he must state his objection and his grounds therefor.

But notwithstanding the policy of requiring definite objections or requests with specific statement of grounds as a condition to appellate review, such policy also has its exception as written in MO. SUPREME COURT RULE 3.27, which provides that plain errors affecting substantial rights may, in the discretion of the court, be none the less considered on appeal, even though not preserved for review, where the court deems that manifest injustice, or a miscarriage of justice, has resulted from the matters complained of. This is a wise rule of saving grace which has been adopted, no doubt to be but infrequently invoked, but always to stand as a judicial declaration that the unmistakable demands of justice are never to be thwarted because of some mere procedural omission on the part of the one whose substantial rights have been denied.

RIGHT OF APPEAL

The most literal compliance with the rules for preserving matters for appellate review will, however, avail a complaining party nothing unless a situation arises where he has the right of appeal; and in this connection he must be ever conscious that the right of appeal exists only as provided by statute, and that in taking and perfecting his appeal it will be essential that he act in obedience to whatever procedure is made mandatory. While appeals are favored, and statutes granting the right are to be liberally construed, the fact remains that a prospective

2. MO. SUPREME COURT RULE 3.23.

appellant has already had his day in court, and that his right of appeal comes to him, not as a natural, inherent, or vested right, but only as a privilege which has been indulged him upon the theory that it is sound policy to afford a method whereby a defeated litigant may have his rights re-examined in a court superior to that in which he feels that his rights have been denied.

Under our present practice appellate review is only secured by appeal (writs of error having been abolished); and the statute[3] which prescribes the right of appeal provides that any party to a suit aggrieved by any judgment of any trial court in any civil cause may take his appeal from any of the several judicial acts enumerated in the statute, including an order granting a new trial and a final judgment in the case. Only these two rulings need be specifically mentioned, since practically all appeals are taken from one or the other of them, with appeals from final judgments being in the vast preponderance.

It is to be noted at the outset that the right of appeal is only accorded a party to the action, and does not embrace one not a party who may consider that he has been aggrieved by the judgment or decision of the court. For instance, a wife's attorney in a divorce action may regard himself as very much aggrieved by the court's denial of a motion for the allowance of an attorney's fee of which he would be the ultimate beneficiary, but he cannot appeal from such an order. He is not a party to the case; and if an appeal is to be taken, it must be by the wife, who alone has the right to apply for such an order, and to whom alone the court could make such an award under its power to decree alimony pending the suit for divorce in all cases where the same would be just.

However, even a party has no right to appeal unless he is personally aggrieved, which, as sometimes happens, is not the case. An executor or administrator, whose duty it is to preserve the estate for the benefit of creditors and distributees, unquestionably has the right to appeal from an order or judgment allowing a claim against the estate which he conceives to be either unlawful or exorbitant. But if a judgment or decision does not affect the executor or administrator in the performance of his duty of administering the estate, he will have no right

3. Mo. Rev. Stat. § 512.020 (1949).

of appeal, as in the case of a judgment which merely determines the rights of beneficiaries as between themselves.

Where a party, voluntarily, and with knowledge of all the material facts, accepts the benefits of an order or judgment, he cannot, as a usual thing, be heard to say that he is aggrieved by such order or judgment and be permitted to prosecute an appeal to reverse it. However, his acceptance of an amount to which he is entitled in any event, or about which there is no controversy, will not bar his right to appeal from the order or judgment directing its payment. In other words, whenever it is possible for a party to obtain a more favorable judgment by appealing, without assuming the risk of a less favorable judgment as a consequence of his appeal, his acceptance of what the judgment gives him will not be inconsistent with an appeal which is taken for the purpose of securing the more advantageous decision.

In the practical taking of appeals the difficulty encountered is not so much with any question of the status of the appellant as a party aggrieved by the judgment or decision of the court as it is with the question of whether the judgment is final both as to scope and as to time.

It is enough to say, generally speaking, that to be final as to scope, the judgment must dispose of all the issues as to all the parties and leave nothing for future determination. Within this category is a dismissal of a cause with prejudice, which, by force of statute operates as an adjudication upon the merits.[4] Under the new code any involuntary dismissal other than for lack of jurisdiction or improper venue is a dismissal with prejudice unless the court in its order specifies otherwise.

The question of the finality of judgments for the purpose of ascertaining the time within which an appeal must be taken is covered by MO. SUPREME COURT RULE 3.24, which was enacted as supplemental to a number of code provisions.

Judgment is entered as of the day of the verdict; and except for the intervention of other circumstances it becomes final at the expiration of thirty days after its entry. However, the timely filing of a motion for a new trial may either accelerate or postpone the date of its finality. When a motion for a new trial is filed, the judgment becomes final if and when the motion

4. MO. REV. STAT. § 510.150 (1949).

for a new trial is overruled, whether before or after the expiration of the period of thirty days, which takes the place of the former judgment term, and marks the period during which the court retains the judgment in its breast, and may amend or modify it, or grant a new trial of its own initiative unless the transcript has been meanwhile filed in the appellate court. Even in the character of case (as a workmen's compensation case) where a motion for a new trial has no function to perform other than to seek relief in the trial court, the filing and disposition of such a motion nevertheless has the same effect in fixing the time for appeal as in the general run of cases where a motion for a new trial is necessary to preserve allegations of error for appellate review. All doubt and uncertainty upon this question was once and for all removed by the Missouri Supreme Court by its opinion in *Seabaugh's Dependents v. Garver Lumber Mfg. Co.*[5]

It is provided that for an appeal to be effective, the notice of appeal must be filed not later than ten days after the judgment or order appealed from becomes final.[6] This is the ordinary appeal, or appeal that a party may take as a matter of right whenever an appeal is permitted by law and he exercises his right within the time prescribed. Construing the new code, the Missouri Supreme Court has held that the timely filing of the notice of appeal is jurisdictional, and is the only requirement necessary to make the appeal effective. Technical adherence to required formal averments of the notice of appeal is not jurisdictional; and any irregularity in the form or contents of the notice will not serve to defeat the appeal where the notice can reasonably be construed as an attempt in good faith to appeal from a final judgment or appealable order.[7] There is in addition the appeal by special order of the appellate court, which the appellant may be permitted to take within six months from the date of final judgment, where the time prescribed for filing the ordinary notice of appeal has expired, and the appellant is able to show the appellate court that his delay was not due to culpable negligence.

It is therefore to be seen that where no motion for a new trial is filed, the ten days for giving notice of appeal begins to run upon the expiration of thirty days after the entry of judgment.

5. 355 Mo. 1153, 200 S.W.2d 55 (1947).
6. Mo. Rev. Stat. § 512.050 (1949).
7. Weller v. Hayes Truck Lines, 355 Mo. 695, 197 S.W.2d 657 (1946).

During the period of thirty days the court retains the judgment in its breast, as has already been pointed out; and any appeal which is undertaken before the expiration of that period is consequently premature. But where a motion for a new trial is filed and overruled, the judgment becomes final upon the entry of the order overruling the motion, whether before or after the expiration of the thirty days; and the ten days for giving notice of appeal begins to run from the date of the entry of the order.

There is, however, this exception, that if the motion for a new trial is not passed on within ninety days after the motion is filed, it is deemed denied for all purposes.[8] This provision was written into the code to insure that the finality of judgments would be delayed beyond what was evidently thought to be the maximum of time that a trial court would need to act advisedly upon any motion for a new trial that might be pending before it. If the court does not act upon the motion within ninety days, then upon the expiration of that period the motion stands arbitrarily overruled by force of statute, and the right of appeal immediately accrues and must be exercised within ten days thereafter.

Regardless of the salutary purpose to be accomplished by the provision of the code that a motion for a new trial not passed on within ninety days shall be deemed denied for all purposes, experience shortly revealed uncertainties which were likely not anticipated at the time of its enactment, and for which no explicit directions were given. For instance, in the case of grounds of the motion calling for the exercise of the trial court's discretion, there is no true basis upon which the appellate court may take the trial court's discretion into account when the record discloses that such discretion had not been exercised one way or the other.

However, a far more serious problem was presented in connection with the continued exercise of the long established practice of requiring a remittitur as a condition to the overruling of a motion for a new trial where the only error found to exist was the return of an excessive verdict.

Under the language of the statute the trial court of course has ninety days within which to pass on the motion for a new trial. When the court orders a remittitur, a period of days, usually ten

8. Mo. Rev. Stat. § 510.360 (1949).

in number, is given within which the plaintiff may elect whether to remit and have final judgment stand for the remainder of his verdict, or whether to refuse to remit and have the motion for a new trial sustained. Until he does exercise his election, it obviously cannot be known what the ultimate result will be.

But suppose the court, although entering its alternative order within ninety days, does so at a time after eighty days, so that the period within which the plaintiff may exercise his election will extend beyond the expiration of ninety days. If the plaintiff neglects to remit until after the expiration of the ninety days, what is the consequence? In other words, is any order of the court a nullity in so far as it may undertake to postpone final disposition of a motion for a new trial beyond the expiration of ninety days? If so, the motion would then be deemed overruled at the expiration of ninety days, and the judgment for the full amount of the verdict would become final and appealable as of that date, notwithstanding the alternative order of the court. On the other hand, if such an order is not a nullity, then there would be no right of appeal until the plaintiff had either exercised his election or the time for the exercise of his election had expired, whereupon, depending upon which of the two alternatives had come to pass, it would either be the right of the defendant to appeal from the reduced judgment, or the right of the plaintiff to appeal from the order sustaining the motion for a new trial.

The Missouri Supreme Court eventually settled the question in the landmark case of *Steuernagel v. St. Louis Public Service Co.*[9] It held that such an order entered before the expiration of ninety days must be construed as having the effect of then granting the defendant a new trial on the ground of excessive verdict, with the option given plaintiff to retain part of his judgment by remitting so much as was excessive. In that view of the matter the motion is passed on within the ninety-day period; and all that remains to be done after the expiration of such period is the making of an entry to show which alternative has come to pass after the plaintiff has made his choice. With the motion thus expressly passed on by the court within ninety days, there is no room for application of the statutory provi-

9. 238 S.W.2d 426 (Mo. 1951).

sion that a motion not passed on within ninety days shall be deemed denied for all purposes.

But even though the motion is passed on within the contemplation of the statute by the entry of the court's alternative order, the judgment nevertheless does not become final until complete disposition of the motion.[10] In the usual case the motion is both passed on and disposed of concurrently. But not so in a situation where the court has ordered a remittitur as a condition to the overruling of a motion for a new trial. In such event the motion cannot be ultimately disposed of until the plaintiff has either exercised his election or the time for the exercise of his election has expired. It is then when the right of appeal accrues, and notice of appeal must be given within ten days thereafter.

BURDEN ON APPEAL

It is ordinarily to be presumed that the judgment or decision of a lower court is correct. Nevertheless, the presumption thus arising adds nothing in support of the judgment or decision when the same is subjected to the review of the appellate court. On the contrary, the presumption is a mere rebuttable procedural presumption which imposes the burden of showing error upon the shoulders of the party who claimed that error was committed.

However an exception may arise in connection with an order sustaining a motion for new trial. It is provided that every order allowing a new trial shall specify of record the ground or grounds upon which the new trial is granted.[11] Occasionally a trial court grants a new trial without specifying any ground whatever for its action; and more frequently, it states its ground in such a general way as not to satisfy the statute.

For instance, it is not enough that the motion may be sustained upon the broad ground that the court erred in admitting incompetent, irrelevant, and immaterial evidence. In like fashion the statutory requirement is not observed when the motion is sustained upon the mere ground that the court erred in giving erroneous, prejudicial, and misleading instructions. In neither event would such a stated ground be sufficiently definite to

10. MO. REV. STAT. § 510.340 (1949).
11. MO. REV. STAT. § 510.330 (1949).

furnish any information to the parties or the court concerning the real basis of the court's action.

To remedy such a situation it is provided by MO. SUPREME COURT RULE 1.10 that when a trial court grants a new trial without specifying the ground or grounds upon which the new trial is granted, the presumption shall be, not that the court's action was correct, but that it was erroneous, and the burden of supporting such action shall be placed on the respondent, provided the appellant serves on the respondent a statement making such allegation of error on or before the time required for filing the transcript on appeal.

A still further situation sometimes comes about in which the nominal respondent has the burden of showing error as to particular matters to be considered by the appellate court.

Within ten days after the return of a verdict, a party who has previously moved for a directed verdict may move to have the verdict and judgment entered on it set aside, and to have judgment entered in accordance with his motion for a directed verdict. Such a motion may be joined with a motion for a new trial, or a new trial be prayed for in the alternative.

When a motion for judgment is filed along with a motion for a new trial and with a prayer for relief in the alternative, the trial court, if it sustains the motion for judgment, should also pass on the motion for a new trial, making its ruling in the alternative, and specifying the ground or grounds for its action.

The difficulty arises where, upon the return of a verdict for the plaintiff, the defendant moves for judgment in accordance with his motion for a directed verdict or in the alternative for a new trial, and the court sustains his motion for judgment but overrules his motion for a new trial. The plaintiff thereupon takes and perfects his appeal, to which the defendant is respondent. If the appellate court reverses the judgment for the defendant, what of its opportunity to review the matters assigned as error in the motion for a new trial?

In this situation the Missouri Supreme Court has held that the defendant, while resisting the plaintiff's appeal from the final judgment in the defendant's favor, may at the same time allege error in instructions or other procedural matters raised in his motion for a new trial.[12] This rests upon the theory that

12. Hughes v. St. Louis Nat. League Baseball Club, 359 Mo. 993, 224 S.W.2d 989 (1949).

the appellate court, once invested with jurisdiction, is entitled to consider everything preserved in the record to determine the proper disposition of the case.

When Appellate Court Acquires Jurisdiction

The filing of the transcript on appeal transfers the case to the appellate court and for the first time invests the appellate court with full jurisdiction over the case. Short of that time the appellate court's authority is limited to certain special powers conferred by statute or rule of the Supreme Court, such as the power to grant an extension of time to file the transcript beyond six months, or to dismiss the appeal upon the failure of the appellant, after giving notice of appeal, to take any of the further steps to secure the review of the judgment or order appealed from.

It is true that when notice of appeal is filed, the clerk of the trial court thereupon mails a copy of the same to the clerk of the appellate court together with the docket fee deposited by the appellant without which there is no valid filing of the notice of appeal. However, the effect of such notice is not to transfer the case to the appellate court, but only to give it notice that the case may be transferred to it in the future.

It is the appellant's obligation to cause the transcript to be prepared and filed with the clerk of the appellate court. If the transcript is not or cannot be prepared within the initial period of ninety days, the trial court has authority to extend the time for a period not to exceed six months, after which the power to grant a further extension of time is vested solely in the appellate court. Where application for an extension of time is not made until after the expiration of the period originally prescribed or as extended by a previous order, it can only be granted upon a showing of excusable neglect.

It is obviously impossible within the proper limits of an article such as this to cover the whole field of appellate practice and procedure. At first blush it may seem strange to terminate the discussion of the subject at the point where the case is merely transferred to the appellate court without going on to elaborate upon the filing of briefs, the argument and submission, and the like. However this has been done designedly and with the idea, confirmed by observation and experience, that where the treat-

ment of the subject may be curtailed, the interest of the lawyer is best served by seeing to it that he is made acquainted with the steps he must take preliminary to the actual transfer of his case to the appellate court. In other words, it is of no benefit to him to have his appeal reach the appellate court unless it comes there in such a way that the court will be in a position to review the merits of the matters of which he complains. Once the case is transferred, the appellate court is then in a position to see for itself that proper procedure is followed and that the rights of all parties are fully protected. All reference to motions for rehearing has been purposely omitted upon the assumption that any lawyer reading the article would hardly be expected to give serious attention to a suggestion that he might ever have need for recourse to such a remedy.